

Nguyen (Migration) [2023] AATA 3841 (16 October 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Ms Thi Minh Ha Nguyen Miss Quynh Quan Hao Nguyen
REPRESENTATIVE:	Dr Ngo Tung Bao (MARN: 0006620)
CASE NUMBER:	2310695
DIBP REFERENCE:	BCC2022/5436291
MEMBER:	Brygyda Maiden
DATE:	16 October 2023
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decisions not to grant the visa applicants Partner (Provisional) (Class UF) visas.

Statement made on 16 October 2023 at 10:30am

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine spousal relationship – no response to s.359A letter – adverse information – inconsistent information between form 40SP and marriage certificate – financial aspects – nature of the household – social aspects – nature of the commitment – decision under review affirmed

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65, 359C, 360

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cl 309.211

CASES

Hasran v MIAC [2010] FCAFC 40

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 11 July 2023 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s 65 of the *Migration Act 1958* (Cth) (the “Act”).
3. The first named visa applicant, a 55-year-old Vietnamese citizen (the “visa applicant”), and her daughter, the secondary visa applicant (who will be 23 in December) applied for their visas on 16 December 2022 on the basis of their relationship with their sponsor, Mr Radovan Montague Laski, who is 75. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the “Regulations”). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visas on the basis that the visa applicant did not satisfy cl 309.211. The delegate was satisfied that the parties were legally married but found there was:
 - no evidence as to the financial aspects of the relationship or the nature of the household;
 - some evidence in relation to the social aspects of the relationship but it was not commensurate with the parties being in a genuine and continuing relationship; and
 - limited evidence in support of the mutuality of the parties’ commitment to each other.
5. The delegate found the visa applicant had not demonstrated that she was the spouse of the sponsor under s 5F of the Act, and therefore, cl 309.211(2) was not met. Clause 309.211(3) did not apply as the parties were already married. Because the visa applicant did not meet the primary criteria for the visa grant, the delegate assessed the secondary visa applicant against the primary criteria. The delegate also found that the secondary visa applicant did not meet cl 309.211.
6. The visa applicant applied to the Tribunal on 24 July 2023. The *Migration Amendment (Subclass 309 Applicant Review Rights) Regulations 2023* (Cth) came into force on 4 April 2023 and amended the Regulations (in particular reg 4.02(5)(r)) to permit visa applicants who had a decision made after 26 February 2021 to refuse to grant a Subclass 309 (Partner (Provisional)) visa to seek merits review at the Tribunal in their own right if the visa was applied for during the concession period. The concession period commenced on 1 February 2020 (see reg 1.15N(1)(a)). In this case the visa applicant applied for the visa on 16 December 2022 (which was during the concession period) and had her visa application refused by the delegate on 11 July 2023. The Tribunal is satisfied that the visa applicant is the person with standing to apply for this review and is therefore the review applicant.
7. There was no hearing in relation to this matter for the reasons discussed below. The visa applicants were represented in relation to the review.
8. The Tribunal notes that the first contact the parties had with the Tribunal was when the sponsor applied to the Tribunal for review on 19 July 2023. An officer of the Registrar of the Tribunal wrote to the representative indicating that it appeared that the visa applicant was the correct party to apply for review. Following that, the visa applicant applied to the Tribunal

for review on 24 July 2023 and since then, there has been no further contact or documents submitted by the visa applicant or her representative in support of this review.

9. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

10. CONSIDERATION OF CLAIMS AND EVIDENCE

11. The issue in the present case is whether the visa applicant is the spouse or de facto partner as defined under s 5F or s 5CB of the Act of the sponsor for the purposes of cl 309.211(2) of Schedule 2 of the Regulations. No additional evidence has been submitted at the time of decision.

12. Section 359A letter

13. The Tribunal wrote to the visa applicant on 11 September 2023, inviting her to comment on the validity of a s 375A certificate which the Tribunal attached. The Tribunal indicated that it held the preliminary view that the certificate was valid and invited her to comment on the validity. Although the Tribunal did not disclose the material covered by the certificate to the visa applicant, it did provide the gist of the information covered by the certificate to the visa applicant pursuant to s 359A which the Tribunal made clear would, subject to the visa applicant's comments or response, be the reason or part of the reason for affirming the decision under review. The Tribunal stated that it had not made up its mind about the information. The particulars of the information are:

contained on the Department file in TRIM reference number(s) OPD2015/115740 of file number BCC2002/5436291. The information relates to a source whose has disclosed their identity to the Department but wishes their identity to remain confidential. The source alleges that as at 3 August 2015:

- a. your sponsor, Radovan Montague Laski's alias is Rodney Lasky.
- b. your sponsor was at that time a director of Swishette Pty Ltd, Litore Pty Ltd, Clinica Internationale Pty Ltd, Pritchards Placements Pty Ltd, Global Eco Learning Pty Ltd and other companies that were being pursued by the ACCC in the Federal Court for misleading and deceptive conduct.
- c. your sponsor intended to deceive immigration into believing that an Asian girl is living with him, and he had female clothing in the wardrobe and in the bathroom and other female goods in the bathroom to give it the lived-in look.
- d. the female involved was desperate and would do anything he said.
- e. your sponsor discussed with his friend (who has been named but the name cannot be disclosed to you) the recruitment of migrants on the promise of work that would lead to permanent residency.
- f. your sponsor signed a contract for 500 jobs in the farming industry, he said it did not matter what job they did and if they were refused permanent residency that was their problem. If they were foolish enough to try and sue then your sponsor would delay court proceedings until their visa runs out and they would be forced to leave the country.
- g. there are allegations of theft against your sponsor.

The information is relevant to the review because it calls your sponsor's credibility into question and the information may indicate that your relationship with your sponsor is contrived and not genuine. This may lead the Tribunal to doubt you are in a genuine and continuing

relationship and doubt that you have a mutual commitment to a shared life to the exclusion of all others as claimed. In order for the visa applicant to be granted the visa, the Tribunal needs to be satisfied that you and your sponsor are in a spousal relationship as per s 5F(2) of the Act.

The consequences of the Tribunal relying on this information is that it may lead the Tribunal to find that you are not a 'spouse' of the visa applicant within the meaning of s 5F of the Act, and as a consequence, that you do not satisfy cl 309.211 and cl 309.221 of Schedule 2 to the *Migration Regulations 1994* (Cth) for the grant of a Partner (Provisional) (Class UF) visa. This would be the reason, or a part of the reason for the Tribunal to affirm the decision of the delegate to refuse your visa.

14. The Tribunal gave the visa applicant until 25 September 2023 to respond. As at the date of this decision, there has been no communication from the visa applicant or the representative.
15. On 26 September 2023, the Tribunal wrote to the visa applicant advising the visa applicant that she had not responded to the s 359A letter or requested an extension of time by the due date. Section 359C of the Act provides that the Tribunal may make a decision on the review without taking any further action to obtain additional information or the visa applicant's views on the information provided to her under s 359A. The Tribunal advised that the visa applicant was no longer entitled to appear before the Tribunal (see s 360 of the Act), and the Tribunal has no power to permit the visa applicant to appear (see *Hasran v MIAC* [2010] FCAFC 40).
16. Additionally, on 5 June 2023 the Department wrote to the visa applicant inviting her to comment on adverse information received. The Department advised the visa applicant that it had received information indicating that the "*sponsor may have entered into a contrived relationship for the purpose of financial gain for his sponsorship*". The visa applicant was given 28 days to respond.
17. A translated statement from the visa applicant appears on the Department file dated 23 June 2023 that also appears to be signed by the sponsor on the same day ("Visa Applicant's Statement"). It is not clear from the Department file whether that was in response to the adverse information as the Statement does not discuss it.
18. The lack of response to the adverse information by the visa applicant in respect of the Tribunal's s 359A invitation is of concern to the Tribunal. Although the adverse information in the s 359A invitation is quite detailed, the bulk of it appears to have limited if any connection with the parties' relationship and it is over eight years old. For this reason the Tribunal gives it no weight. The adverse information put to the visa applicant by the Department indicates only that the sponsor "may" have entered a contrived relationship and that there "may" have been financial gain. As there is no evidence to support or consistent with this allegation the Tribunal also gives this no weight.

Are the parties in a spouse or de facto relationship?

19. Clause 309.211(2) requires that, at the time the visa application was made, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. With limited exceptions that only apply in relation to a decision to grant or not grant a Subclass 309 visa made on or after 20 August 2022 (which is the case here as the visa was refused on 11 July 2023), the visa applicant must continue to be the spouse or de facto partner at the time of the Tribunal's decision:

cl 309.221. In this case, there is no evidence before the Tribunal that the sponsor has died; or of the visa applicant or a member of the family unit of the sponsoring partner or both of them suffering family violence committed by the sponsor; or that there are any arrangements in relation to custody, joint custody, access orders, residence orders or contact orders in relation to any children. Therefore, the Tribunal is satisfied that there is no evidence that any of the exceptions apply.

20. In the present case the visa applicant claims to be the spouse of the sponsor who is an Australian citizen. A copy of the bio pages of the sponsor's Australian passport appear on the Department file.
21. "Spouse" is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)–(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and the sponsor's household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) is effectively a question which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

22. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The Department file contains a translated copy of the parties' Vietnamese marriage certificate which indicates that the parties' marriage was registered on 1 November 2016. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a). However, this evidence alone does not in the Tribunal's view demonstrate a mutual commitment to a shared life together or a relationship that is genuine and continuing.
23. Of concern, the sponsor, in the "Sponsorship for a partner to migrate to Australia" form 40SP dated 12 December 2022, claims that the date of the parties' marriage was 1 January 2016, which is not consistent with the marriage certificate, and not consistent with the photographs on the Department file of the parties' wedding held on 20 October 2016. The Tribunal has concerns about the sponsor's written evidence (which the sponsor would have had the ability to consider), as a marriage is a significant relationship milestone and it is reasonable to expect genuine spouses to correctly identify their wedding date. This causes the Tribunal concern about the genuineness of the parties' relationship.

Are the other requirements for a spouse relationship met?

24. *Financial aspects of the relationship*

25. The Tribunal has considered the financial aspects of the relationship, including any joint ownership of real estate or other major assets; joint liabilities; extent of any pooling of financial resources; whether one person in the relationship owes any legal obligations in respect of the other and the basis of any sharing of day-to-day household expenses.

26. *Do the parties have any joint ownership of real estate or other major assets or any joint liabilities?*

27. There is no evidence before the Tribunal at the time of application or the time of decision that the parties have any joint ownership of real estate or other major assets nor that they have any joint liabilities.

28. *To what extent is there any pooling of financial resources?*

29. The "Application for migration to Australia by a partner" form on the Department file generated on 16 December 2022 ("Application for Migration Form") states that the *"visa applicant and sponsor have spent their cash together during the [sic] sponsor was in Vietnam in 2016 and 2019. They have jointly paid for their wedding and trips in Ho Chi Minh City. The sponsor has opened a savings account with Vietcom Bank in joint names and deposited AUD500 and gave the bank book to the visa applicant to keep."* There is no evidence on the Department file or before the Tribunal to support the claims in the form that such an account has been opened or that the wedding and trips have been paid for jointly. Therefore, the Tribunal gives the parties' claimed pooling of financial resources little weight.

30. *Does one person in the relationship owe any legal obligations in respect of the other?*

31. There is no evidence before the Tribunal at the time of application or the time of decision that the parties owe any legal obligations in respect of each other.

32. *What is the basis of any sharing of day-to-day household expenses?*

33. The Application for Migration Form states during the visa applicant's three-month stay in Australia in 2022, she lived with the sponsor and he paid for her food and other needs. Although there are a small amount of photographs of the parties together in Australia on the Department file including photographs of the parties in what is labelled to be the sponsor's home and a statutory declaration from Thi Minh Thanh Nguyen that the visa applicant stayed with the sponsor on that trip to Australia there is no evidence of sharing of day-to-day household expenses. The Tribunal gives this little weight.

34. *Conclusion as to the financial aspects*

35. At the time of application and decision there is no evidence of any joint ownership of real estate or other major assets, no joint liabilities; little evidence of the extent of pooling of financial resources; no evidence of any legal obligations owed to the other party; and little evidence of the sharing of day-to-day household expenses. There is little evidence of the financial aspects of the parties' relationship, however, given the parties for the most part have resided in different countries being Vietnam and Australia the parties may have had difficulty establishing the financial aspects of their relationship. Therefore, the Tribunal has given this consideration neutral weight.

36. *Nature of the household*

37. The Tribunal has considered evidence of the nature of the parties' household, including any joint responsibility for the care and support of children, the living arrangements of the persons and any sharing of the responsibility of housework.

38. *Is there any joint responsibility for the care and support of children?*

39. The secondary visa applicant will be 23 in December 2023, and the Application for Migration Form indicates that she is the visa applicant's daughter. There is no evidence before the

Tribunal that the parties have any children together or have joint responsibility for the care and support of any children, including but not limited to the secondary visa applicant.

40. *What are the parties' living arrangements?*

41. The Application for Migration Form indicates that at the time of application the visa applicant was living in Binh Thanh District, Ho Chi Minh City in Vietnam, and the sponsor was living in Point Cook, Victoria, Australia. As at 15 December 2022, Thi Minh Thanh Nguyen's statutory declaration states that the sponsor lives by himself. The Tribunal notes that Thi Minh Thanh Nguyen is the visa applicant's sister.
42. The "Application for review – Migration" form submitted to the Tribunal by the visa applicant dated 24 July 2023 specifies the address in Australia where she currently lives as the Point Cook address of the sponsor on the Application for Migration Form. As at the date of this decision, it is not clear what her address or living arrangements are or that of the sponsor.
43. Other than that already discussed, at the time of application and decision there is a small amount of evidence as to the parties' living arrangements.

44. *Is there sharing of the responsibility of housework?*

45. The Application for Migration Form states that when the parties have cohabited they have shared housework including cooking, cleaning and laundry. There are photographs on the Department file of the parties in the kitchen together. However, given the parties for the most part live in separate countries and have not really had the opportunity to establish a household together and therefore share the responsibility of housework, the Tribunal affords this consideration neutral weight.

46. *Conclusion on the nature of the parties' household*

47. In respect of the nature of the parties' household, at the time of application there is no evidence that the parties have any children of their own or have any joint responsibility for the care and support of any children. The parties live in separate countries, Australia and Vietnam, but there is no other evidence as to their living arrangements; there is a small amount of evidence of housework being shared. The Tribunal accepts the difficulties that the parties would have in trying to establish the nature of the household given that for the most part they reside in separate countries, and for this reason, the Tribunal affords the nature of the parties' household neutral weight.
48. At the time of decision, other than the application for review form submitted to the Tribunal which appeared to indicate that the visa applicant was at that stage living at the sponsor's residence, there has been no further evidence submitted to indicate that the parties have any responsibility for the care and support of children, there is limited information about the parties' living arrangements and no indication of any sharing of the responsibility of housework. Despite the lack of evidence, the Tribunal continues to accept the difficulties that the parties would have in trying to establish the nature of the household given that for the most part they reside in separate countries, and for this reason, the Tribunal affords the nature of the parties' household neutral weight.

49. *Social aspects of the relationship*

50. The Tribunal has considered evidence of the social aspects of the relationship, including whether the persons represent themselves to other people as being married to each other, the opinion of the persons' friends and acquaintances about the nature of the relationship, and any basis on which the persons plan and undertake joint social activities.

51. *Do the persons represent themselves to other people as being married to each other?*

52. The Application for Migration Form states that the parties had a wedding before friends and relatives with more than 100 people in attendance. Photographs on the Department file that are labelled and dated, show the parties at their wedding together and with others with the narration stating it was held on 20 October 2016 at Dai Dam restaurant in Ho Chi Minh City. The photographs do not make it clear that 140 people were in attendance despite a handwritten note on a photograph indicating that 140 people were in attendance at the wedding. However, the Tribunal does accept that there is evidence that the parties have represented themselves as being married to each other and gives this some weight. No further evidence has been submitted to the Tribunal as to whether the parties continue to represent themselves as being married to each other.

53. *What is the opinion of the persons' friends and acquaintances about the nature of the relationship?*

54. The Department file contains a form 888 statutory declaration of:
- a. Thi Minh Thanh Nguyen, dated 15 December 2022. Ms Nguyen is the visa applicant's sister, and had known the sponsor at the time of the declaration for eight years. She declares that she met the sponsor when she was working at a hairdresser and they became friends and occasionally met. The parties married in 2016, and the sponsor has been to Vietnam to visit and live with the visa applicant a number of times in the last six years. The visa applicant came to Australia to stay with "her husband" from July 2022 to October 2022 and Ms Nguyen met with them a number of times. She believes the parties' relationship is genuine. The sponsor does not have any relatives in Australia and lives by himself. He has medical conditions that require him to see doctors and be in hospital often. The visa applicant has told her she loves the sponsor and wants to be with him in Australia as soon as possible to care for him. The Tribunal gives this some weight in support of the parties representing themselves as being married but the declaration provides a small amount of information from Ms Nguyen as to her opinion of the nature of the parties' relationship, which the Tribunal gives a small amount of weight to.
55. The Tribunal notes that there were no other statements provided and none from the parties' acquaintances and friends which causes the Tribunal concern as to what opinion the parties' friends and acquaintances hold about the nature of the parties' relationship.
56. *Is there any basis on which the persons plan and undertake joint social activities?*
57. The Department file contains a small number of photographs that are labelled to have been taken in:
- a. 2016, that show the parties eating out together, having drinks with others, at Mui Ne beach together and with others, and at various locations;
 - b. 2022 when the visa applicant came to visit the sponsor in Australia. They show the parties and others at Melbourne Airport, of the parties in the kitchen together, in various parts of the house together and having a meal together and having a meal with others. The Visa Applicant's Statement states that during the visit the sponsor took her on a "*tour of many of Australia's beautiful landscapes*". There is no indication of this from the photographs submitted to the Department, and therefore the Tribunal gives this claim little weight.

58. Departmental notes indicate that on 19 June 2023, the visa applicant arrived in Australia again. No photographs were submitted for 2023. The Tribunal accepts that the parties are known to each other and have socialised together. However, the Tribunal is concerned that given the parties' lengthy relationship there is a relatively small amount of evidence supporting the parties planning and undertaking of social activities which does not appear to be consistent with the parties being in a genuine and continuing relationship.

59. *Conclusion on the social aspects of the relationship*

60. At the time of application, the parties represented themselves to their wedding guests as being married to each other. There is a statutory declaration of a family member that also indicates that the parties are married but it provides a small amount of opinion as to the nature of the parties' relationship. There is no evidence from the parties' friends and acquaintances as to the nature of their relationship. Although there is some evidence as to the basis on which the persons plan and undertake joint social activities, the events depicted and places shown are limited which does not appear consistent with a relationship of the duration claimed. For these reasons, the Tribunal finds that although there is evidence of the social aspects of the relationship it does not provide much support for the proposition that the parties are in a genuine and continuing relationship or there is a mutual commitment to a shared life together.
61. At the time of decision, no evidence has been submitted to the Tribunal in respect of the social aspects of the parties' relationship or anything else. For these reasons, at the time of decision, despite there being evidence that the visa applicant was in Australia in 2023, there is no additional evidence to that already discussed that the parties continue to represent themselves as being married, from the parties' friends or acquaintances as to their opinion on the nature of the relationship or that the parties have planned and undertaken joint social activities. For these reasons, the Tribunal finds that the social aspects of the parties' relationship are not consistent with the parties being in a genuine and continuing relationship or having a mutual commitment to a shared life.

62. *Nature of persons' commitment to each other*

63. The Tribunal has considered evidence of the nature of the persons' commitment to each other, including the duration of the relationship, the length of time the parties have lived together, the degree of companionship and emotional support that the persons draw from each other and whether the persons see the relationship as a long-term one.

64. *What is the duration of the relationship?*

65. The parties have been married since 20 October 2016 (with their marriage registered on 1 November 2016). The Application for Migration Form indicates that the parties were introduced in 2015 by a mutual friend. The parties contacted and talked to each other by FaceTime and phone for nearly a year before the sponsor travelled to Vietnam on 19 October 2016 and the parties' wedding was on 20 October 2016. The Visa Applicant's Statement indicates that the parties had after a few months of talking on the phone decided to meet and get married. At the time of application the parties had been married and in a relationship for a duration of over six years. The Tribunal affords this weight. At the time of decision the parties have been married and in relationship for a duration of over seven years. The Tribunal affords this weight. However, the Tribunal notes that there were no communication records submitted to the Department or to the Tribunal.

66. *What is the length of time the parties have lived together?*

67. The Application for Migration Form states that during *“the period of three months of visa applicant’s stay in Australia, she lived with the sponsor and he has paid the food [sic] and other needs for her. The visa applicant and the sponsor lived in different countries. They have lived together in Ho Chi Minh City during the visits of the sponsor in 2016 and 2019 and in Australia during the visa of the visa [applicant] in 2022.”* It states that the:
- a. sponsor travelled to Vietnam on 19 October 2016, the parties had their wedding on 20 October 2016, registered their marriage on 1 November 2016, after *“marriage the sponsor continued to live and spent time together with the visa applicant”* and the sponsor returned to Australia on 5 November 2016. However, in the Visa Applicant’s Statement it is stated that the visa applicant saw the sponsor off at the airport for return to Australia on 3 November 2019. The Tribunal suspects that the 2019 is a typographical error.
 - b. sponsor travelled to Vietnam on 7 November 2019 and departed on 21 November 2019 and lived with the visa applicant during this time. The Tribunal notes that the form does not cover the claimed trip the sponsor made from 8 March 2019 until 28 August 2019 which is discussed in the Visa Applicant’s Statement;
 - c. parties did not see each other during the COVID-19 pandemic period (which the Tribunal accepts and does not attach any adverse weight to);
 - d. visa applicant came to Australia on a visitor visa and lived with the sponsor from 12 July 2022 until 5 October 2022.
68. Departmental notes and the visa applicant’s application for review indicate that she was in Australia in 2023, with the application for review listing the sponsor’s address as her address. Although the parties have claimed to live together, other than the statutory declaration of Thi Minh Thanh Nguyen which provides support for the parties living together when the sponsor travelled to Vietnam and on the visa applicant’s trip to Australia in 2022 there is no other evidence that they were living together at those times. There is no evidence to support the parties living together in 2023 and the Tribunal has concerns about whether the parties have lived together as claimed.
69. *What is the degree of companionship and emotional support that the persons draw from each other?*
70. The Visa Applicant’s Statement indicates that the parties communicated on the phone after their introduction to each other in late 2015. She also states that the parties communicated and “spiritually” supported each other over the phone when the COVID-19 pandemic broke out. There is no evidence in support of any communication between the parties at those times or at all.
71. The Application for Migration Form states that when the sponsor stayed in her home in Vietnam in 2019, he was sick and she took him to the hospital, where he remained for four days. She cared for him in the hospital and on his return to her home until he departed for Australia. During her three-month visit in Australia, she cared for him when he was unwell. No medical records were submitted.
72. The Visa Applicant’s Statement gives consistent information as to the sponsor’s hospitalisation for heatstroke during his trip to Vietnam. The visa applicant and her

children took turns caring for him in the hospital. There is no evidence of the sponsor's hospitalisation.

73. There is little evidence of the degree of companionship that the persons draw from each other and a small amount of evidence of the visa applicant providing emotional support to the sponsor. The Tribunal gives this a small amount of weight.

74. *Do the persons see the relationship as a long-term one?*

75. A translated statement from the visa applicant appears on the Department file dated 23 June 2023, which states that the parties' plan for the future is for the sponsor to enrol the visa applicant in English courses when she arrives in Australia. The Tribunal gives this a small amount of weight.

76. *Conclusion on the nature of the parties' commitment to each other*

77. At the time of application the parties had been married and in a relationship for a duration of over six years. The Tribunal affords this weight. There is a small amount of evidence that they lived together when the sponsor travelled to Vietnam and when the visa applicant travelled to Australia in 2022. There is no evidence of the level of companionship that the parties draw from each other but there is a small amount of evidence in relation to emotional support that the visa applicant has provided the sponsor. There is little evidence as to whether the parties see the relationship as a long-term one. Although there is some evidence to support the nature of the parties' commitment to each other, the Tribunal is not satisfied that it provides much support for the parties being in a genuine and continuing relationship.
78. At the time of decision, the duration of the parties' relationship and marriage is approximately seven years. The Tribunal is not satisfied that the parties lived together during the visa applicant's visit in 2023 but accepts that there is a small amount of evidence that they lived together during the visa applicant's 2022 visit and when the sponsor travelled to Vietnam. Other than that already discussed at the time of application, there is little evidence of the degree of companionship and emotional support that the parties derive from each other. There is also some evidence that the parties see the relationship as a long-term one. Although there is some evidence to support the nature of the parties' commitment to each other, the Tribunal is not satisfied that it provides much support for the parties being in a genuine and continuing relationship.

79. CONCLUSION

80. The Tribunal is satisfied that the parties are legally married as required by s 5F(2)(a). There is limited evidence in support of the parties' claims about their relationship (though the Tribunal notes the parties' relationship duration which provides support for the parties being in a genuine and continuing relationship). For the reasons already identified with respect to the reg 1.15A(3) matters, the Tribunal is not satisfied that at the time of application or the time of decision the parties had a mutual commitment to a shared life as a married couple to the exclusion of all others as required by s 5f(2)(b) or were in a genuine and continuing relationship as required by s 5F(2)(c) of the Act. The Tribunal is not satisfied that the requirements of s 5F(2) are met at the time the visa application was made and at the time of this decision and finds that the visa applicant does not meet cl 309.211 or cl 309.221.
81. In relation to the secondary visa applicant, as the Tribunal has found that the visa applicant and the sponsor are not spouses for the purposes of the Act, the secondary visa applicant

cannot meet the criteria for a Subclass 309 visa as a member of the family unit of a person who has satisfied the primary criteria.

82. For the reasons above, the visa applicants do not satisfy the criteria for the grant of the visa.

DECISION

83. The Tribunal affirms the decisions not to grant the visa applicants Partner (Provisional) (Class UF) visas.

Brygyda Maiden
Member

ATTACHMENT – Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).